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No. _____

In the Supreme Court of the United States

GREGORY WILSON,

Petitioner,

v.

LADONNA H. THOMPSON, IN HER OFFICIAL CAPACITY AS COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Did the Court of Appeals err in holding that petitioner is time-barred from challenging Kentucky's method of execution under 42 U.S.C. § 1983, even though his challenge was filed while his conviction and sentence were still under review in federal post-conviction proceedings, and even though the execution protocols that the Court of Appeals held should have been challenged at an earlier date had been declared void *ab initio* by the Kentucky courts?

PARTIES

Petitioner is Gregory Wilson, a Kentucky death-sentenced inmate.

Respondents are LaDonna H. Thompson, in her official capacity as Commissioner of the Kentucky Department of Corrections; Phil Parker, in his official capacity as Warden of Kentucky State Penitentiary; Scott Haas, in his official capacity as Medical Director for the Kentucky Department of Corrections; Steve Beshear, in his official capacity as Governor of the Commonwealth of Kentucky; and Unknown Executioners (collectively "Respondents").

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 620 F.3d 699 and is reprinted, along with the judgment from that decision, in Petitioner's Appendix A (Pet. App.) pp. 1a-8a. The Court of Appeals' subsequent denial of Petitioner's request for rehearing en banc is not reported, but is reprinted, with the Amended Order, at Pet. App. C & D, pp. 23a-34a.

The District Court Opinion and Judgment dismissing Petitioner's claims is also unreported, but is reprinted at Pet. App. B, pp. 9a-22a.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals entered Judgment on September 3, 2010 (Pet. App. A, p. 7a), and denied rehearing en banc on September 16, 2010. (*Id.* p. 23a). On October 14, 2010, the Court entered an amended Order denying rehearing *en banc* and included the dissent by Judge Martin. (*Id.* p. 25a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

This case raises claim accrual questions for method of execution claims brought under 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

At a joint trial with codefendant Brenda Humphrey in September 1988, Gregory Wilson was convicted of murder, kidnapping, rape, robbery and conspiracy to commit robbery and was sentenced to death by a jury in the Kenton Circuit Court, Covington, Kentucky. *Wilson v. Commonwealth*, 836 S.W.2d 872 (Ky. 1992). On direct appeal, the Kentucky Supreme Court affirmed Wilson's convictions and death sentence for murder, but vacated the death sentence for kidnapping. *Id.* Wilson's direct review of those convictions ended with this Court's denial of certiorari in 1993. *Wilson v. Kentucky*, 507 U.S. 1034 (1993).

Approximately five years later on March 31, 1998, Kentucky adopted lethal injection as the "primary, presumptive method of execution." Kentucky Revised Statute (KRS) § 431.220. In doing so, the statute also afforded those individuals who received a sentence of death prior to the statute's adoption (such as Wilson)

the option of choosing electrocution over lethal injection if made at least twenty (20) days prior to the execution date. *Id.*

In July 2004, Wilson co-filed a group grievance with other death row inmates seeking administrative relief for alleged defects in Kentucky's lethal injection protocol as well as the imposition of death by electrocution. (Pet. App. B, p. 11a). On July 26, 2004, the inmates' group grievance was rejected on the basis that it sought redress for "a non-grievable issue." (*Id.*)

In 2007, and before the expiration of Wilson's appeals from the denial of habeas relief,[1] Wilson filed the present action challenging Kentucky's execution protocol as contrary to the Eighth Amendment's ban on cruel and unusual punishment. *Id.* The district court ultimately ruled Wilson's claims untimely and thus barred by Kentucky's one-year statute of limitations for § 1983 actions. (Pet. App. B, 18a-19a). During the pendency of Wilson's appeal from that decision, the Kentucky Supreme Court invalidated Kentucky's then-existing lethal injection protocol in *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478 (Ky. Nov. 25, 2009), as corrected (Jan. 4, 2010). Several months later in May, 2010 (and in response to the *Bowling* decision), Kentucky adopted the execution protocol that is currently in place. (Pet. App. A, pp. 3a-4a).

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[1] The district court denied Wilson's Petition for Writ of Habeas Corpus on September 30, 2004. That ruling was affirmed by the Sixth Circuit in 2008, and this Court denied certiorari in 2009. *See Wilson v. Parker*, 515 F.3d 682 (6th Cir. 2008) (affirming denial of habeas relief), *cert. denied*, 130 S.Ct. 113 (2009).

Decisions Below

In November 2007, Wilson filed the present challenge to Kentucky's execution protocol making several claims, some of which were articulated in his 2004 group grievance. The district court, in evaluating whether Wilson's claims were time-barred, relied upon the Sixth Circuit Court of Appeals' decision in *Cooey v. Strickland* (*Cooey II*), 479 F.3d 412 (6th Cir. 2007), which identified the claim accrual framework for method of execution claims brought under 42 U.S.C. § 1983.

Cooey II set the accrual date for method of execution claims as being: 1) the conclusion of direct review of the underlying conviction; or 2) if the execution method were adopted after the conclusion of direct review, when the inmate "knew or should have known [the method of execution] based upon a reasonable inquiry, and could have filed suit and obtained relief." *Id.* In applying this framework to the facts in *Cooey II*, the Court of Appeals specifically declined to pinpoint the precise accrual date for plaintiff's method of execution claims, but determined that those claims were nonetheless untimely because they were outside Ohio's statute of limitations for § 1983 actions when measured from when Ohio adopted lethal injection as its sole method of execution (the latest point in time in which the claims would accrue). 479 F.3d at 423.

Here, because direct review of Wilson's underlying convictions concluded before Kentucky adopted its lethal injection statute, the district court (as did the Court of Appeals in *Cooey II*) focused its assessment on when Wilson "knew or should have known" of the act

giving rise to his claims. (Pet. App. B, p. 15a-16a). And in assessing when Wilson's claims became sufficiently ripe for judicial resolution, the district court avoided identifying a definitive point, opting instead to conclude that Wilson's claims became ripe "no later than when Wilson participated in a group grievance challenging the lethal injection protocol on constitutional grounds in 2004." (*Id.* p. 17a). Thus, according to the district court, Kentucky's one-year statute of limitations for § 1983 actions (when measured from the filing of the grievance in 2004) barred Wilson's claims. *Id.*

After Wilson filed his notice of appeal from the dismissal, however, the Kentucky Supreme Court invalidated Kentucky's lethal injection protocol in *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478 (Ky. Nov. 25, 2009), as corrected (Jan. 4, 2010). The Kentucky Supreme Court found that the execution protocol affected death row inmates' private rights. Consequently, the Department of Corrections' failure to promulgate the protocol in accordance with statutory rulemaking requirements rendered the protocol invalid. *Id.*

Following the *Bowling* decision, Wilson sought dismissal of his pending appeal on the basis that the invalidation of Kentucky's execution protocol rendered his challenge moot. The Sixth Circuit Court of Appeals denied the request and subsequently affirmed the dismissal of Wilson's claims as time-barred. (Pet. App. A, pp. 4a-6a).

In doing so, the Court of Appeals rejected Wilson's argument that the Kentucky Supreme Court's decision in *Bowling* reset the applicable statute of limitations.

(*Id.* at 4a). According to the Court of Appeals, the invalidation of the execution protocol had no effect on the timeliness of Wilson's claims because none of the changes occasioned by that decision, *i.e.* promulgation of the protocol in accordance with the state's rulemaking requirements, related to Wilson's "core complaints," which challenged the drugs used and method of administration. (*Id.* at 4a-5a). Wilson now asks this Court to grant certiorari from the Court of Appeals' decision.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S CLAIM ACCRUAL FRAMEWORK FOR METHOD OF EXECUTION CLAIMS IS INCONSISTENT WITH THIS COURT'S DECISION IN *WALLACE V. KATO.*

In *Wallace v. Kato*, 549 U.S. 384 (2007), this Court held that federal law determines when claims accrue under 42 U.S.C. § 1983, even though the statute of limitations for § 1983 claims is borrowed from state law. *Id.* at 388. The Court then went on to hold, as a matter of federal law, that § 1983 claims accrue when the plaintiff "has a complete and present cause of action," which occurs when the plaintiff can "file suit and obtain relief." *Id.*

Purporting to rely on *Kato*, the Sixth Circuit in *Cooey II* announced that the method of execution claims brought under 42 U.S.C. § 1983 accrue for statute of limitations' purposes upon the conclusion of direct review of the underlying sentence, or if the execution method were adopted after the conclusion of direct review, when the inmate "knew or should have

known [of his method of execution cause of action] based upon a reasonable inquiry, and could have filed suit and obtained relief." *Id.*, 479 F.3d at 422.[2]

As this case illustrates, the Sixth Circuit's standard creates an impossible Catch-22 for death row inmates that cannot be reconciled with *Wallace v. Kato*. For death row inmates like petitioner, whose method of execution is set before the completion of habeas proceedings, challenges to the method of execution that are timely under the Sixth Circuit's accrual rules may well be dismissed on ripeness grounds. Conversely, challenges to the method of execution that are brought after the completion of habeas proceedings, and are therefore undeniably ripe, will be dismissed under *Cooey II* as untimely. The dismissal of petitioner's claim on these facts is especially inappropriate, moreover, because the decision below misapprehended the significance of the Kentucky Supreme Court's invalidation of the then-existing execution protocol in *Bowling v. Kentucky Department of Correction*, 301 S.W.3d 478 (Ky. Nov. 25, 2009), as corrected (Jan. 4, 2010).

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[2] In addition to the Sixth Circuit, at least two additional Courts of Appeals — the Fifth and the Eleventh Circuits — have also adopted a claim accrual analysis for method of execution claims finding that such claims accrue for statute of limitations purposes upon the conclusion of direct review of the underlying conviction. *Walker v. Epps*, 550 F.3d 407 (5th Cir. 2008); *McNair v. Allen*, 515 F.3d 1168 (11th Cir. 2008).

A. The Sixth Circuit's claim accrual framework is inconsistent with *Wallace v. Kato*.

By imposing upon death-sentenced inmates the necessity of bringing method of execution claims within one year of the conclusion of direct review,[3] the Sixth Circuit's claim accrual framework is inconsistent with *Wallace v. Kato* because it imposes a judicially created deadline upon the filing of such claims that is insufficiently tethered to the analysis of whether the claimant "'can file suit and obtain relief.'"[4] *Kato*, 549 U.S. at 388 (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). And in doing so, *Cooey II* will likely foreclose review to claimants by requiring that they file any method of execution claims before they are sufficiently ripe for judicial resolution.[5]

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[3] In Kentucky, a one year statute of limitations applies to § 1983 actions. *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179 (6th Cir. 1990).

[4] The Court of Appeals in *Cooey II* held that the conclusion of direct review by the state of the underlying conviction is "an attractive choice" for determining when method of execution claims accrue because "absent collateral civil proceedings, [it marks] the point at which the state sets the execution date" and when the inmate "can file suit and obtain relief." 479 F.3d at 418-19.

[5] It is also notable that in *Cooey II*, the Court of Appeals found plaintiff's claim untimely as measured from 2001 — a point in time when the Sixth Circuit barred § 1983 method of execution claims. *In re Sapp*, 118 F.3d 460 (6th Cir. 1997). Not until this Court's later decision in *Nelson v. Campbell*, 541 U.S. 637 (2004), were such actions cognizable in the Sixth Circuit. Thus, death sentenced inmates were foreclosed from bringing § 1983 method

For example, the premature adjudication that flows from the *Cooey II* framework is evident when one considers the ramifications of its application. Specifically, capital defendants will be required to initiate any method of execution claims under § 1983 while simultaneously (or prior to) seeking habeas relief. Typically, as occurred here, a capital defendant's execution is stayed and no execution date is re-set until after conclusion of the state post-conviction and federal habeas proceedings. Thus, the consequences of setting accrual at the conclusion of direct review are either: (1) method of execution claims that are timely under *Cooey II* will nonetheless be deemed not ripe for adjudication, or (2) method of execution claims will be litigated (and adjudicated) despite the possibility that they may be subsequently rendered moot by state post-conviction (or federal habeas) proceedings. In either event, simultaneous, parallel litigation will occur challenging both the underlying conviction and sentence, as well as the particular method of execution and any attendant claims.

Moreover, *Cooey II* requires death row inmates to challenge methods of execution at a point where execution has been stayed and no execution date is pending. Here, Wilson's execution date was stayed by the United States District Court on May 10, 1999, shortly before Wilson filed his petition for habeas relief. No execution date was set thereafter until after the conclusion of the habeas appeals.[6]

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of execution challenges until 2004, but the *Cooey II* framework barred the claim at issue for not being brought before then.

[6] After Wilson exhausted his appeals from the denial of habeas relief, Kentucky's Governor signed a warrant of execution on

In dissenting from *Cooey II*, Judge Gilman noted the problems created by the majority's claim accrual framework:

> "[B]oth the petitioners and the courts will have to manage the cognitive dissonance and inefficiency of simultaneously deciding (1) habeas petitions attacking the validity of the conviction and sentence, and (2) § 1983 actions challenging the constitutionality of the procedure used to carry out the sentence."

Cooey II, 479 F.3d at 429 (Gilman, J., dissenting). Judge Gilman further noted that an alternative claim accrual framework would provide greater "clarity and certainty to both the death-sentenced inmate and the State that the sentence is final and not susceptible to attack, that the execution date is set, and that the protocol for that execution is likely to be fixed." *Id.* Specifically, Judge Gilman endorsed fixing the claim accrual point for method of execution claims at the point when a petitioner's execution becomes "imminent," *i.e.* when all state and federal challenges to the validity of the death sentence have been exhausted, and when he has reason to know of the facts giving rise to his claim. *Id.* at 426.

Here, Wilson filed his claims before the expiration of his appeals from the denial of habeas relief. Under the approach endorsed by Judge Gilman and advanced

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August 25, 2010 for an execution date of September 16, 2010. That date was later vacated by a stay issued in conjunction with pending state court litigation challenging Kentucky's execution protocol. *See Bowling, et al. v. Kentucky Dept. of Corrections, et al.*, No. 06-CI-574 (Franklin Cir.).

by Wilson as the correct legal standard — accrual occurs when the inmate knew or should have known of the facts giving rise to the claim, *and* when all state and federal avenues of relief have been exhausted — Wilson's claims here are timely and sufficiently ripe to present a justiciable case or controversy. This approach is consistent with principles of claim accrual and ripeness, and is more faithful to the principles of comity, federalism, and finality than the "conclusion of direct review" framework adopted in *Cooey II*.[7]

B. The decision below misapprehends the legal significance of the Kentucky Supreme Court's invalidation of the execution protocol on the claim accrual analysis rendering it contrary to *Kato* and in conflict with statute of limitations rulings in the Ninth and D.C. Circuits.

In *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478, 486-492 (Ky. Nov. 25, 2009), *as corrected* (Jan. 4, 2010), the Kentucky Supreme Court examined whether Kentucky's lethal injection protocol was subject to the state's Administrative Procedures Act,

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[7] The *Cooey II* analysis will further exacerbate the risk of premature adjudication when one considers that the time for filing a habeas petition may be tolled by pursuing a state post-conviction petition. *See Lawrence v. Florida*, 549 U.S. 327, 329 (2007) (citing 28 U.S.C. § 2244(d)(2)). Thus, federal courts will likely be required to adjudicate method of execution claims prior to hearing the merits of an inmate's habeas petition. *See also McNair v. Allen*, 515 F.3d 1168, 1179 (11th Cir. 2008) (Wilson, J., dissenting) ("death-sentenced prisoners will be required to pursue method of execution challenges several years prior to their executions and during the same time they are challenging their convictions and sentences on habeas").

KRS Chapter 13A. The trial court, reversing an earlier ruling, held that it was not and dismissed the action. *Bowling* 301 S.W.3d at 483.

On review, the Kentucky Supreme Court concluded that because Kentucky's lethal injection protocol: 1) "is solely for the purpose of implementing the death penalty provided for by the General Assembly;" and 2) affects the "private rights of those individuals being executed," the protocol consists of regulations that must comply with Kentucky's APA. *Bowling*, 301 S.W.3d at 488. Thus, the Court reversed the trial court's later ruling, reinstated that portion of the earlier ruling finding the protocol in violation of the state's APA, and ordered any future lethal injection protocols (to the extent they affect private rights) be adopted in accordance with the APA. *Id.* at 492. For the reasons discussed below, this ruling rendered Kentucky's then-existing lethal injection protocol void *ab initio*. Moreover, the Sixth Circuit's opinion finding it insignificant to the claim accrual analysis contravenes *Wallace v. Kato*.

1. The Kentucky Supreme Court's decision in *Bowling* rendered Kentucky's lethal injection protocol void *ab initio*.

KRS § 13A.120(4) provides: [a]ny administrative regulation in violation of this section or the spirit thereof is *null, void, and unenforceable*." (Emphasis added); *see also* KRS § 13A.130(2) (rendering administrative memoranda, internal policies and other agency actions "null, void, and unenforceable" when done in violation of section). Thus, Kentucky law plainly establishes that administrative regulations adopted in contravention of statutory requirements

(such as those that were in effect at the time Wilson filed his claims in this case) are void. A void action is one that has "no legal force or binding effect," and is "wholly ineffective, inoperative, and incapable of ratification and which thus has no force or effect so that nothing can cure it." Black's Law Dictionary 1573 (6th ed. 1990).

This conclusion is further confirmed by Kentucky cases finding that invalidated regulations are rendered void having no legal force or effect. *See, e.g., Faust v. Commonwealth*, 142 S.W.3d 89, 99 (Ky. 2004) (finding administrative regulations "null, void, and unenforceable" under KRS § 13A.120(4)); *see also Vincent v. Commonwealth*, 593 S.W.2d 99, 101 (Ky. App. 1979) (finding policy not adopted in conformity with predecessor statute to Chapter 13A as void and having "no effect").

2. Kentucky's promulgation of a lethal injection protocol in accordance with the state's APA resets the accrual date for method of execution claims as to the future protocol. The Sixth Circuit's ruling to the contrary conflicts with statute of limitations holdings in the Ninth and D.C. Circuits.

The Sixth Circuit Court of Appeals rejected Wilson's contention that the invalidation (and subsequent promulgation) of Kentucky's lethal injection protocol reset the statute of limitations applicable to his claims challenging the lethal injection protocol. (Pet. App. A, p. 4a). The Court of Appeals relied upon *Cooey II* to conclude that because the changes to Kentucky's protocol, *i.e.* its adoption

pursuant to statutory rulemaking requirements, did not relate to Wilson's "core complaints," the changes were insignificant in evaluating the timeliness of Wilson's claims. *Id.*

However, the Sixth Circuit's deeming as irrelevant to the statute of limitations analysis the fact that Kentucky's execution protocol was void *ab initio* is inconsistent with *Wallace v. Kato*, in that it disregards settled principles governing federal claim accrual.

Specifically, as a matter of Kentucky law, there was no valid and binding execution protocol until it is adopted in compliance with Kentucky's Administrative Procedures Act. Without conceding the validity of Kentucky's current protocol,[8] Wilson maintains that its promulgation in May, 2010 marks the earliest possible date on which he had "'a complete and present cause of action.'" *Kato*, 549 U.S. at 388 (quoting *Bay Area Laundry*, 522 U.S. at 192); *see also Rawlings v. Ray*, 312 U.S. 96, 98 (1941) (stating that determination of when there was "a complete and present cause of action" turned upon "the construction of the [challenged] assessment and *the authority of the Comptroller to make it under the applicable federal legislation*.") (emphasis added).

The Sixth Circuit's decision is also inconsistent with other circuits' consideration of the timeliness of claims where prior actions were void *ab initio*. *See*

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[8] Wilson challenges the sufficiency of Kentucky's promulgation of its current execution protocol under the state's Administrative Procedures Act as an intervenor-plaintiff. *See Bowling, et al. v. Kentucky Dept. of Corrections, et al.*, No. 06-CI-574 (Franklin Cir.).

Cabazon Band of Mission Indians v. City of Indio, Cal., 694 F.2d 634, 638 (9th Cir. 1982) (finding city's annexation of federally reserved lands void *ab initio*, thus state statute of limitations did not bar challenge to annexation); *see also Motor & Equipment Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 460 (D.C.Cir. 1998) (finding plaintiffs' challenge to ***third version*** of EPA rule timely where first version declared void *ab initio* by agency and challenge to second version would have been "fruitless" in light of agency's response to plaintiffs' comments).

Here, because Respondents lacked any authority under the prior execution protocol as it was void *ab initio*, the earliest operative point at which a litigant's claims could accrue is when Kentucky adopted its existing protocol in May, 2010.

In this case, the Sixth Circuit holds, in essence, that death row inmates should have filed a challenge to a lethal injection protocol at a time when the protocol was void and of no legal effect, years before a protocol would be promulgated consistent with the law of Kentucky.[9] Such a result conflicts with *Kato* as well as the holdings in both the Ninth and D.C. Circuits.

CONCLUSION

The Sixth Circuit's claim accrual holding applied here conflicts with this Court's ruling in *Wallace v. Kato* and will burden federal courts by requiring petitioners in capital habeas proceedings, and the courts in which they are pending, to simultaneously

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[9] See footnote 8 above.

litigate § 1983 claims challenging methods of execution.

In addition, the holding here that the Kentucky Supreme Court's invalidation of the lethal injection protocol in *Bowling* should have no effect on the accrual of the statute of limitations likewise violates *Kato* and conflicts with other claim accrual decisions from both the Ninth and D.C. Circuits. For these reasons we urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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DECEMBER 14, 2010

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-6306

[Filed September 3, 2010]

GREGORY LEE WILSON, *Plaintiff-Appellant,*

v.

JOHN D. REES, *Defendant,*

THOMAS SIMPSON, in his official capacity as Warden, Kentucky State Penitentiary; SCOTT HAAS, in his official capacity as Medical Director for the Kentucky Department of Corrections; STEVE BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky; LADONNA H. THOMPSON, in her official capacity as Commissioner, Kentucky Department of Corrections, *Defendants-Appellees.*

Appeal from the United States District Court for the Eastern District of Kentucky at Frankfort. No. 07-00078—Karen K. Caldwell, District Judge.

Decided and Filed: September 3, 2010

Before: BOGGS, GIBBONS, and COOK, Circuit Judges.

COUNSEL

ON BRIEF: William E. Sharp, AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, GENERAL COUNSEL, Louisville, Kentucky, Michael J. O'Hara, O'HARA, RUBERG, TAYLOR, SLOAN & SARGENT, Covington, Kentucky, for Appellant. John C. Cummings, COMMONWEALTH OF KENTUCKY, JUSTICE AND PUBLIC SAFETY CABINET, Frankfort, Kentucky, for Appellees.

OPINION

BOGGS, Circuit Judge. Appellant Gregory Wilson is a Kentucky inmate. In 1988, a jury convicted him of murder, kidnapping, rape, robbery, and conspiracy to commit robbery, and he was sentenced to death. Wilson's direct review concluded in 1993 when the U.S. Supreme Court denied certiorari. *Wilson v. Kentucky*, 507 U.S. 1034 (1993).

In November 2007, Wilson filed the underlying action in district court under 42 U.S.C. § 1983. Wilson challenged Kentucky's lethal injection protocol as contrary to the Eighth and Fourteenth Amendments of the United States Constitution and to analogous provisions of the Kentucky Constitution.

The district court dismissed Wilson's complaint as time-barred by Kentucky's one-year statute of limitations on civil actions, relying on this court's holding in *Cooey v. Strickland (Cooey II)*, 479 F.3d 412 (2007). *Wilson v. Rees*, No. 3:07-CV-78-KKC, 2009 WL 3188947 at *3 (E.D. Ky. Sept. 30, 2009); *see* KY. REV. STAT. § 413.140(1)(a). In *Cooey II*, we ruled that the accrual date for method of execution claims is the date of the conclusion of direct review, or if direct review concluded before the method of execution was established, when the inmate "knew or should have known [the method of execution] based upon a reasonable inquiry, and could have filed suit and obtained relief." *Cooey II*, 479 F.3d at 421-22. In accordance with *Cooey II*, the district court held that the statute of limitations began to run no later than 2004, when Wilson filed a prison grievance challenging the protocol, and that Wilson's claim was thus time-barred. *Wilson v. Rees*, No. 3:07-CV-78-KKC at *7. Wilson's timely appeal followed.

We review a district court's holding that a complaint is barred by the statute of limitations under the *de novo* standard. *Bonner v. Perry*, 564 F.3d 424, 430 (6th Cir. 2009); *see Cooey II*, 479 F.3d at 416. Wilson does not argue that the district court incorrectly applied *Cooey II*, however, so we must assume that the court's *Cooey II* analysis was correct. *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 462 (6th Cir. 2003) ("An appellant waives an issue when he fails to present it in his initial briefs before this court.").

In November 2009, shortly after Wilson filed his appeal, the Kentucky Supreme Court held that the state's lethal injection protocol must comply with

Kentucky's Administrative Procedures Act, and that before any further inmates were executed, the state had to issue the protocol as a valid regulation. *Bowling v. Ky. Dept. of Corrections*, 301 S.W.3d 478, 492 (Ky. 2009). Within weeks, the state issued a proposed regulation, and after a notice-and-comment period, the lethal injection protocol was adopted as a regulation on May 7, 2010. *See* 501 KY. ADMIN. REGS. 16:330 (2010).

Wilson argues that *Bowling* voided the state's lethal injection protocol and that the statute of limitations must reset upon the issuance of the new regulation. Wilson further argues that remand is necessary to fully determine *Bowling's* impact on the statute of limitations analysis.

We disagree and hold that *Cooey II* continues to squarely control this case, even after the Kentucky Supreme Court decision in *Bowling*. In *Cooey II*, the court was confronted with a similar claim against Ohio's lethal injection protocol. *See Cooey II*, 479 F.3d at 423. During the pendency of the appeal, Ohio made changes to its lethal injection protocol in response to various issues encountered in a previous execution. *Ibid.* The changes included a more flexible time frame, a more complete pre-execution medical examination, and various changes to the IV procedure. *Id.* at 424. Because none of these changes related to Cooey's "core complaints," we held that the timeliness of Cooey's complaint was not impacted by the changes to Ohio's protocol. *Ibid.*

Here, the state merely adopted its preexisting protocol as a regulation, making no material changes to the method of execution. Wilson's "core complaints"

challenge the drugs used and the methods of administering those drugs, issues extraneous to whether the protocol is issued as an internal guidance document or as an administrative regulation. As it relates to Wilson's claims, the new regulation is indistinguishable from the previous lethal injection protocol. *Compare* 501 KY. ADMIN. REGS. 16:330 *with* Lethal Injection Protocol (12/14/2004), *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, J.A., vol. IV at 971-983 (2007) *and* First Amended Complaint, R. 3 at 6-7. Further, Wilson makes no reference to any particular protocol document in his complaint, but rather describes the method of execution that he seeks to challenge. Quite reasonably, Wilson's complaint is not concerned with the form of the protocol, but rather the manner in which the protocol dictates that he will be executed. To the extent that his manner of execution allegations were true at the time he filed his complaint, they are equally as true today. There is even less possible merit to a claim of change of circumstances that, arguably, would restart the statute of limitations clock than there was in *Cooey II* itself, which rejected such a claim. Therefore, *Bowling* and its aftermath do not disrupt the district court's holding that Wilson's complaint is barred by the statute of limitations. *Cooey II*, 479 F.3d at 421-24.

In the alternative, Wilson argues that *Cooey II* was wrongly decided. We can not entertain this argument. *Salami v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decisions of another panel. The prior decision remains the controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.").

The decision of the district court is therefore AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-6306

[September 3, 2010]

GREGORY LEE WILSON,
Plaintiff - Appellant,

v.

JOHN D. REES,
Defendant,

THOMAS SIMPSON, in his official capacity as Warden, Kentucky State Penitentiary; SCOTT HAAS, in his official capacity as Medical Director for the Kentucky Department of Corrections; STEVE BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky; LADONNA H. THOMPSON, in her official capacity as Commissioner, Kentucky Department of Corrections,
Defendants - Appellees.

Before: BOGGS, GIBBONS, and COOK, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Kentucky at Frankfort.

THIS CAUSE was heard on the record from the district court and was submitted on briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at FRANKFORT

Civil Action No. 3:07-CV-78-KKC

[Filed September 30, 2009]

GREGORY WILSON	)
	)
Plaintiff	)
	)
V.	)
	)
JOHN D. REES, ET AL.	)
	)
Defendants	)
	)

MEMORANDUM OPINION AND ORDER

Plaintiff Gregory Wilson is a Kentucky inmate sentenced to death for a kidnapping, robbery, rape and murder he committed in 1987. Wilson filed this civil rights action pursuant to 42 U.S.C. § 1983 to challenge the lethal injection protocol Kentucky intends to utilize in carrying out his death sentence as a violation of the Eighth Amendment's prohibition against "Cruel and Unusual Punishments." [Record No. 1] The Defendants have moved for dismissal or judgment on the pleadings on the grounds that Wilson's claim is time-barred, was

not properly exhausted, and fails as a matter of law under the standard announced by the Supreme Court in *Baze v. Rees*, 128 S.Ct. 1520 (2008). [Record No. 25] Wilson has filed his response in opposition [Record No. 28] to which the Defendants have replied. [Record No. 29] The Court will grant the motion on the ground that Wilson's claims are time-barred under controlling Sixth Circuit precedent.

I. Factual Background.

In May 1987, Wilson and Humphrey kidnapped Deborah Pooley at knife point on her way home from work in Newport, Kentucky. The testimony at trial indicated that Wilson robbed and raped the victim in the back seat of her car and then strangled her until she was dead. A jury found the defendants guilty, and Wilson was sentenced to death on the kidnapping and murder counts and consecutive prison terms of 20, 20 and 10 years on the rape, robbery, and conspiracy counts. The Kentucky Supreme Court vacated the death sentence on the kidnapping conviction, but affirmed the death sentence on the murder charge. *Wilson v. Commonwealth*, 836 S.W.2d 872, 876-77 (Ky. 1992). The Supreme Court denied certiorari on April 19, 1993.

Effective March 31, 1998, Kentucky revised its criminal statutes to provide that lethal injection was the presumptive method to carry out a sentence of death:

> (1) (a) Except as provided in paragraph (b) of this subsection, every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances

> sufficient to cause death. The lethal injection shall continue until the prisoner is dead.
>
> (b) Prisoners who receive a death sentence prior to March31, 1998, shall choose the method of execution described in paragraph (a) of this subsection or the method of execution known as electrocution, which shall consist of passing through the prisoner's body a current of electricity of sufficient intensity to cause death as quickly as possible. The application of the current shall continue until the prisoner is dead. If the prisoner refuses to make a choice at least twenty (20) days before the scheduled execution, the method shall be by lethal injection.

KRS 431.220. The statute establishes lethal injection as the presumptive method of execution, although prisoners like Wilson who were convicted before March 31, 1998, may choose electrocution if they do so at least 20 days before their scheduled execution.

On July 28, 2004, Wilson signed his name to a "group grievance" filed by himself and other death row inmates, which asserted that "the drugs, the amounts of drug and the timing of the drugs" under the Kentucky Department of Corrections' "Policies, Procedures, and Protocols" are "wrong thus making the way lethal injection is performed is criminal and violates the Inmates Civil Rights." The grievance also expresses concern regarding the use of non medical staff and problems presented by inmates with compromised veins. The grievance was rejected as presenting a non-grievable issue on July 26, 2004.

Wilson filed his Complaint in this case on November 21, 2007. In it, he asserts that the protocol which Kentucky will use to carry out his death sentence by lethal injection presents an unacceptable risk of unnecessary harm in violation of his right to be free from "Cruel and Unusual Punishments" under the Eighth Amendment to the Constitution of the United States. More specifically, he challenges each of the three drugs to be injected, the amount to be injected, and the timing of doing so; the sufficiency of the training and education of the persons who will be involved in the execution; and the refusal of state officials to provide him with more detailed information regarding the protocol.

II. Discussion.

The Defendants contend that Wilson's Complaint should be dismissed because his claims are barred by the applicable statute of limitations, because Wilson did not timely and properly administratively exhaust some or all of his claims, and because his contentions are contrary to the Supreme Court's holding in *Baze v. Rees*, 128 S.Ct. 1520 (2008). Because the Court's resolution of the statute of limitations issue is dispositive of the claims in this case, it need not and does not reach the Defendants' second and third arguments.

In *Hill v. McDonough*, 126 S.Ct. 2096 (2006), the Supreme Court held that a death-sentenced inmate can challenge a state's intended method of carrying out his or her execution in a civil rights action pursuant to 42 U.S.C. § 1983 rather than through a habeas corpus petition under 28 U.S.C. § 2254. In doing so, the Supreme Court did not address related matters such

as claim accrual, ripeness, or the applicable statute of limitations. Because, by their nature, challenges to a lethal injection protocol invariably challenge conduct which will occur in the future - rather than in the past - such matters have proved problematic.

Nonetheless, several circuit courts of appeal, including the Sixth Circuit, adhere to the view that such lethal injection challenges are subject to the same statute of limitations considerations as other civil rights actions. *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007); *McNair v. Allen*, 515 F.3d 1168 (11th Cir. 2008). Civil rights claims arising out of conduct occurring in Kentucky are subject to the one-year statute of limitations for residual tort claims found in KRS 413.140(1)(a). *Collard v. Kentucky Board of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990); *University of Kentucky Bd. of Trustees v. Hayse*, Ky., 782 S.W.2d 609, 613 (1989). The statute typically begins to run when a plaintiff becomes aware of facts which would indicate to a layperson that he or she should act to protect her rights. *Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996); *Kelly v. Burks*, 415 F.3d 558, 561 (6th Cir. 2005); *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991).

The Sixth Circuit, applying this general rule of claim accrual to the context of method-of-execution claims, has held that a challenge to a lethal injection protocol as cruel and unusual - on whatever grounds - accrues once the state that convicted the inmate has completed its direct review of his conviction and the plaintiff knows or has reason to know about the act providing the basis of his or her injury. *Cooey v. Strickland*, 479 F.3d 412, 418-19 (6th Cir. 2007) ("[setting] the accrual date at the conclusion of direct

review by the state ... is also an attractive choice because it marks the point at which the state has rendered its criminal judgment final and, absent collateral civil proceedings, the point at which the state sets the execution date. Furthermore, the death-sentenced inmate can file suit and obtain relief."). In *Cooey*, however, the inmate's conviction became final ***before*** Ohio had adopted lethal injection as a permissible means of execution in 1993 or as the required means of execution in 2001. Because "Cooey obviously could not have discovered the 'injury' until one of these two dates," the Sixth Circuit held that his claim accrued on one of these two dates, but did not decide the issue because the claim was time-barred under either approach. *Cooey*, 479 F.3d at 422.

Wilson argues that *Cooey* does not mandate a particular result in this case because, unlike the Ohio statute which required executions in 2001 and beyond to be carried out by lethal injection, the Kentucky statute vests him with the right to choose between lethal injection and electrocution at any time up to 20 days before his scheduled execution. [Record No. 28 at pg. 5] According to Wilson, the potential that he might choose electrocution at some point in the future rendered any challenge to the lethal injection protocol unripe until the very moment he renounced his right to choose electrocution in the amended complaint he filed in this action. [Record No. 28 at pg. 6; Record No. 3 at ¶82]

As a threshold matter, Wilson cites *Cooey* for a proposition which the Sixth Circuit expressly declined to decide: while *Cooey* indicates that a method-of-execution challenge to lethal injection accrues ***no later than*** when that method becomes the

exclusive one by which executions are carried out, it left open the question whether such a claim accrued in fact far earlier, when lethal injection became an optional, rather than required, method of execution. *Cooey*, 479 F.3d at 422. If the latter approach were applied, Wilson's claim accrued in 1998 when the Kentucky legislature adopted lethal injection as the presumptive method of execution even though he had not made an election under KRS 431.220(1)(b), and his claims would unquestionably be time barred.[1]

Wilson also appears to uncritically intermingle notions of accrual and ripeness, two distinct legal concepts. With respect to accrual, *Cooey* teaches that a lethal injection claim has accrued once a state has completed direct review of the inmate's conviction, which occurred in Wilson's case in 1993, and once the inmate has reason to know of the act giving rise to the

---

[1] Further, Wilson's argument, if accepted, might prove too much. Wilson contends that a Kentucky death-sentenced prisoner's affirmative election between execution by lethal injection or electrocution is the *sine qua non* for a method-of-execution claim to become ripe. As a legal matter, this assertion is contrary to the well-established law cited by Wilson in his own brief. As a factual matter, Wilson's assumption that he may make the election permitted by KRS. 431.220(1)(b) in an amended complaint filed with a federal court, as opposed to a formal written declaration, signed by him and submitted to the Kentucky Department of Corrections, is speculative at best. While the statute is silent on the time, manner, specificity, or revocability of giving notice of the election, it is far from clear that his present statement of a future intent to not invoke his right to an election satisfies the statute or is otherwise enforceable. If it is not, then even under Wilson's view, his own lethal injection claims remain unripe, and this matter would have to be dismissed without prejudice for lack of subject matter jurisdiction.

claim. *Cooey*, 479 F.3d at 422. In *Cooey*, the Sixth Circuit held that the "act giving rise to the claim" was Ohio's adoption of lethal injection as a method of execution, whether in the alternative or as the exclusive means. Wilson argues for a radical departure from this holding, asserting in essence that the act which will give rise to the justiciability of his claim will be his own act, when and if he decides to perform it, of definitively choosing between lethal injection and electrocution for purposes of KRS 431.220.

Wilson is of course correct that "[r]ipeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." [Record No. 28 at pg. 5] (*quoting Cleveland Branch, N.A.A.C.P. v. City of Parma, OH*, 263 F.3d 533 (6th Cir. 2001)). This concern is present in all lethal injection litigation up until the point the claims are either deemed meritorious warranting relief or the inmate is executed. However, the potential that the future actions challenged may not come to pass presents a ***concern*** regarding ripeness, it does not *ipso facto* render the claims unripe. Rather, when faced with such a possibility, the court must still decide whether to proceed in the face of that risk. As the Sixth Circuit has explained:

> In ascertaining whether a claim is ripe for judicial resolution, we ask two basic questions: (1) is the claim "fit[ ] ... for judicial decision" in the sense that it arises in a concrete factual context and concerns a dispute that is likely to come to pass? and (2) what is "the hardship to the parties of withholding court consideration"?

Warshak v. United States, 532 F.2d 521, 525 (6th Cir. 2008) (*citing Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). As did the Sixth Circuit in *Cooey*, the Court finds no reason to definitively establish a particular point in time when Wilson's lethal injection claims presented a ripe controversy, except to conclude that such time occurred no later than when Wilson participated in a group grievance challenging the lethal injection protocol on constitutional grounds in 2004, if not earlier when Kentucky fixed lethal injection as the presumptive method of execution in 1998.

Wilson's claims regarding the constitutionality of the lethal injection protocol certainly involved "a dispute that is likely to come to pass" when Kentucky adopted that method as the presumptive means of execution in 1998. While Wilson's retained right to choose electrocution rendered his execution by lethal injection less than a "certainty," it certainly remained "likely" under a statute which established lethal injection as the default method in the absence of an affirmative election by the death-sentenced inmate.

Further, the dispute arose in a "concrete factual context" certainly no later than 2004 when Wilson asserted in his group grievance that specific aspects of the protocol - including the identity, amount, and timing of the drugs and the qualifications of those who would administer them - rendered the protocol unconstitutional. There is no question that the factual basis for Wilson's claims was sufficiently developed no later than that juncture to present a live, ripe controversy for adjudication.

As a final matter, ordinarily, when a defendant challenges a plaintiff's claim on ripeness grounds as brought too early, the court enquires into whether withholding consideration of the merits willcauseanunnecessaryhardship on the parties, particularly the plaintiff. *Abbott Labs*, 387 U.S. at 149. In this context, where the roles are essentially reversed, it is appropriate to consider whether delaying consideration of the merits on ripeness grounds will cause an unnecessary hardship on the parties, particularly thedefendant. Kentucky's statute permits an inmate sentenced to death before March 31, 1998, to make an election between alternative methods of execution at any time prior to 20 days before the execution is scheduled. In this regard, the Court is mindful of "the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 126 S.Ct. 2096 (2006). The Court is thus not inclined to adopt Wilson's proposed analysis of ripeness, which would permit, and under the Defendants' construction of thestatute prevent, theassertion of a claim, let alone its consideration and adjudication, until 20 days before a scheduled execution. As a practical matter, Wilson's proposed rule would require the entry of a stay of execution in all cases in order to give adequate time for consideration of the merits. In contrast, the Court's analysis would promote, rather than undermine, "[the] strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay," *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). The Court must therefore conclude that Wilson's lethal injection claims accrued when Kentucky adopted lethal injection as the

presumptive method of execution, and became ripe for adjudication either at that time or no later than the denial of his 2004 group grievance.

Other courts considering like claims are in accord with this conclusion. With respect to accrual, under similar facts the court in *Henley v. Little*, 2009 WL 311139 (M.D. Tenn 2009), concluded that under *Cooey*, a death-sentenced inmate's challenge to Tennessee's lethal injection protocol accrued on March 30, 2000, when lethal injection became Tennessee's presumptive method of execution, in a statute functionally identical to Kentucky's. *Id.* at **3-4. With respect to ripeness, in *Poland v. Steward*, 117 F.3d 1094 (9th Cir. 1997), a death-sentenced Arizona inmate challenged the constitutionality of execution by lethal gas and by lethal injection, two methods from which the inmate could choose under the applicable Arizona statute. Because the statute established lethal injection as the presumptive method of execution and the inmate had not made an affirmative election to be executed instead by lethal gas, the Ninth Circuit found his challenge to execution by lethal gas unripe. *Poland*, 117 F.3d at 1104. In contrast, apparently finding no ripeness concern in addressing his challenge to lethal injection, the presumptive method of execution, the Ninth Circuit addressed the claim on the merits and rejected it. *Id.* at 1105; *see also Jones v. Allen*, 485 F.3d 635, 639 n.2 (11th Cir. 2007).

Pursuant to Federal Rule of Civil Procedure 25(d), current Commissioner of the Kentucky Department of Corrections LaDonna Thompson is **SUBSTITUTED** as a party defendant and former Commissioner John D. Rees is **DISMISSED** as a party to this action, and current Governor Steve Beshear is **SUBSTITUTED**

as a party defendant and former Governor Ernie Fletcher is **DISMISSED** as a party to this action.

III. Conclusion.

Accordingly, **IT IS ORDERED** that:

1. Defendants' Motion to Dismiss, or in the alternative, for Judgment on the Pleadings [Record No. 25] is **GRANTED**, and Wilson's Complaint [Record No. 1] is **DISMISSED WITH PREJUDICE**.

2. The Court will enter an appropriate Judgment. Dated this 30th day of September, 2009.

[SEAL] Signed By:
Karen K. Caldwell KKC
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at FRANKFORT

Civil Action No. 3:07-CV-78-KKC

[Filed September 30, 2009]

GREGORY WILSON	)
	)
Plaintiff	)
	)
V.	)
	)
JOHN D. REES, ET AL.	)
	)
Defendants	)
	)

JUDGMENT

Consistent with the Memorandum Opinion and Order entered today, pursuant to Rule 58 of the Federal Rules of Civil Procedure it is **ORDERED AND ADJUDGED** that:

1. The Complaint filed by Plaintiff Gregory Wilson pursuant to 42 U.S.C. § 1983 against Commissioner LaDonna H. Thompson; Governor Steve Beshear; Warden Thomas Simpson; and Medical Director Dr. Scott Haas, as Defendants [R. 1] is **DISMISSED WITH PREJUDICE**, and Judgment is **ENTERED** in favor of the Defendants.

Entered on September 30, 2009.

[SEAL] **Signed By:**
Karen K. Caldwell KKC
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-6306

[September 16, 2010]

GREGORY LEE WILSON,
Plaintiff - Appellant,

v.

JOHN D. REES,
Defendant,

THOMAS SIMPSON, in his official capacity as Warden, Kentucky State Penitentiary; et al.

Before: BATCHELDER, Chief Circuit Judge; MARTIN, BOGGS, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, and WHITE, Circuit Judges

This matter came before the court upon the petition for rehearing en banc of the September 3, 2010 judgment of the three-judge panel and the response of the appellees thereto. A poll having been taken of the active judges of the court on the question of whether to grant the petition for rehearing en banc, and less than

a majority of the judges having favored doing so, the request for rehearing has been referred to the original panel. Upon consideration of the petition and response the panel denies the petition.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-6306

[Filed October 14, 2010]

GREGORY LEE WILSON, *Plaintiff-Appellant,*

v.

JOHN D. REES, *Defendant,*

THOMAS SIMPSON, in his official capacity as Warden, Kentucky State Penitentiary; SCOTT HAAS, in his official capacity as Medical Director for the Kentucky Department of Corrections; STEVE BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky; LADONNA H. THOMPSON, in her official capacity as Commissioner, Kentucky Department of Corrections, *Defendants-Appellees.*

Before: BATCHELDER, Chief Judge; MARTIN, BOGGS, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK,

McKEAGUE, GRIFFIN, KETHLEDGE, and WHITE, Circuit Judges.

AMENDED ORDER

This matter came before the court upon the petition for rehearing *en banc* of the September 3, 2010 judgment of the three-judge panel and the response of the appellees thereto. A poll having been taken of the active judges of the court on the question of whether to grant the petition for rehearing *en banc*, and less than a majority of the judges having favored doing so, the request for rehearing has been referred to the original panel. Upon consideration of the petition and response the panel denies the petition.

IT IS SO ORDERED.

BOYCE F. MARTIN, JR., Circuit Judge, dissenting from denial of rehearing en banc. I continue to disagree with the claim-accrual analysis for method-of-execution claims announced in *Cooey v. Strickland* (*Cooey II*), 479 F.3d 412 (6th Cir. 2007), and therefore I dissent from the denial of rehearing en banc. *See, e.g.*, *Cooey v. Strickland*, 489 F.3d 775, 776-78 (6th Cir. 2007) (Gilman, J., dissenting from the denial of rehearing en banc). In addition, I write to highlight this particularly ugly example of why "the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair." *Moore v. Parker*, 425 F.3d 250, 268 (6th Cir. 2005) (Martin, J., dissenting).

The rape and murder of Debbie Pooley was a heartbreaking and reprehensible act. But at Gregory Wilson's murder trial, the state's ignominy began. Of

all the people involved in this case, only two have behaved in a manner worthy of the ideals of our justice system: the courageous Franklin Circuit Court judge who stayed Wilson's execution; and Andrew Wolfson, the diligent Courier-Journal reporter who exposed the glaring deficiencies in Wilson's trial. I quote extensively from Mr. Wolfson's article because he appears to have worked more conscientiously than many of the participants in this case, and he highlights how virtually every branch of our justice system failed — from the judiciary, which allowed a sex scandal between a colleague of the trial judge and Wilson's co-defendant to jeopardize the fairness of Wilson's trial; to the defense counsel, who were woefully unqualified and left Wilson abandoned at trial.

The judiciary failed both Wilson and our legal system in this case because a judge's unseemly conduct created a risk of bias that undermined the fairness of Wilson's trial. Brenda Humphrey, Wilson's co-defendant and the woman who identified him as Pooley's killer, was having an illicit sexual affair with Judge James Gilliece, a colleague and good friend of the trial judge during Wilson's trial:

> Years later, it would be revealed in court papers that Wilson's co-defendant, Brenda Humphrey, who testified against him, was taken each day of the trial to the chambers of Lape's colleague, Circuit Judge James Gilliece, where they had sex.
>
> His trysts with the former prostitute began three years earlier and continued until his death in 1993. Gilliece wrote Humphrey 280 sexually explicit letters in which he called her

> his "doll baby" and assured her — erroneously, it turned out — that "you are sure to be free very soon."

Andrew Wolfson, *Kentucky Death-Row Inmate's Trial Littered with Problems*, Courier- Journal, Sept. 8, 2010, at A1.

This shocking impropriety not only degraded our judicial system, but also created a real risk of unfairness at Wilson's trial:

> [In] 2001 . . . Humphrey filed a motion seeking a new trial, revealing her relationship with Gilliece. She argued that he forced himself on her and that kept her from getting effective representation.
>
> Humphrey testified that after being charged with prostitution in 1985, she began seeing Gilliece about once a week in his chambers for sex, even after she was charged in Pooley's kidnapping and murder.
>
> Records showed that Gilliece put $3,000 in her jail account, bought her a new dress for trial and wrote her florid love letters.
>
> Kenton Circuit Judge Steven Jaeger eventually rejected Humphrey's motion, saying she was a "willing participant" and "mistress of her own fate."
>
> Jaeger, however, wouldn't let Wilson participate in the hearing he granted Humphrey, and [Wilson's attorney] Goyette says that denied Wilson the chance to prove that the relationship between Gilliece and Humphrey may have affected how Lape conducted the trial.

> If Wilson had known of the relationship at the time of the trial, Goyette said, he could have used it to undermine Humphrey's credibility when she testified against him.

Id.

This scandal is an embarrassment to all segments of the judiciary, from the judge who violated the Code of Judicial Conduct by having a sexual relationship with a defendant to the court officers who broke their oath of office by ferrying this defendant to and from the judge's chambers for sex. When any trial is infiltrated by this sort of sordid corruption, it demeans our judicial system and undermines public confidence in its judgments. When a criminal defendant's life is at stake, it is horrifying.

Perhaps even more egregiously than the judiciary, Wilson's defense counsel failed him and the principles of our legal system. From the very beginning of the case, Wilson's defense was clearly a charade:

> The judge posted his plea on the courtroom door: "PLEASE HELP. DESPERATE. THIS CASE CANNOT BE CONTINUED AGAIN."
>
> After more than a year of begging for lawyers to defend Gregory Wilson's capital-murder case for the maximum state fee of $2,500, Chief Kenton Circuit Judge Raymond Lape Jr. finally found two takers in May 1988.
>
> But one of them, John Foote of Florence, had never tried a felony, let alone a murder case. And the other was William Hagedorn of Newport, a "semi-retired" lawyer who volunteered to serve as lead counsel for free,

> though he had no office, no staff, no copy machine and no law books.
>
> Hagedorn practiced out of his home, where he displayed a flashing "Budweiser" sign. His business card gave the phone number of "Kelly's Keg," a local bar. And as Foote would later say in an affidavit, Hagedorn "manifested all the signs of a burned-out alcoholic."
>
> . . . .
>
> As Goyette later summarized it in court papers, Hagedorn "was a troubled lawyer with drinking problems, bar association disciplinary problems and legal problems of the criminal variety," investigated on allegations of hiding stolen property under his office floor.
>
> "Even if he was not drinking . . . he would ramble and digress," Foote said. "He seemed incapable of having a meaningful discussion about the case."

Id.

Unsurprisingly, these two wholly unqualified attorneys did a deplorable job representing Wilson:

> According to briefs later filed on Wilson's behalf, Hagedorn visited his client once in jail before trial. He failed to investigate evidence collected by police, including a knife-like letter opener owned by Humphrey, to see if it was stained with blood.
>
> Hagedorn also failed to interview a jailhouse informant who claimed Wilson had confessed. And he neglected to interview or subpoena Humphrey's sister, who had told police that

> Brenda Humphrey had admitted cutting the victim's throat.
>
> Perhaps most egregiously, Goyette said, Hagedorn failed to prepare early for the penalty phase of the trial, so that family members who later said they would have testified on behalf of sparing Wilson's life were never contacted.

Id.

Multiple sources have noted the appalling quality of representation that Wilson's defense counsel provided:

> In an interview, Goyette said Wilson's trial was a "complete farce and a mockery." In a brief, one of Wilson's previous lawyers likened the appointment of Hagedorn, who died in 1991, to "drafting a chiropractor to do brain surgery."
>
> And Stephen Bright, president and senior counsel for the Southern Center for Human Rights, who has written about the case, said in an e-mail that it is a "travesty of justice" and among the worst examples he's ever seen of a defendant tried for his life with unqualified counsel.

Id.

Wilson found himself in the impossible position of having no competent counsel and sorely lacking any skills and resources to defend himself:

> For the first two days of jury selection, Wilson allowed Hagedorn and Foote to represent him.

But he continually complained they weren't competent.

Lape, the trial judge, ordered the lawyers to assist Wilson during the trial, but they came and went, according to witnesses, one of whom estimated that Hagedorn was present less than half the time.

Wilson delivered his own opening statement. According to a transcript, it read, in its entirety: "I am not a lawyer, and I'm not guilty."

For the first two days of trial, Wilson questioned none of the prosecution witnesses.

"I don't know how to question," he said.

He didn't challenge Humphrey's testimony that he strangled Pooley, and he didn't call as a witness her sister, Lisa Mains, who had told police that "Brenda said she was the one that cut her throat."

Neither Wilson nor Hagedorn cross-examined the two other key prosecution witnesses, Finkenstead and Willis Maloney, the jailhouse witness, and the jury never learned that Maloney once dated Humphrey and allegedly beat her for dating Wilson.

Wilson allowed Hagedorn to cross-examine several expert witnesses, and he did so effectively, the Kentucky Supreme Court would later find.

He got one expert to admit he couldn't establish the cause of Pooley's death and found no evidence she'd been raped, and one of the Holiday Inn maids to concede she couldn't remember anything about the man she said was with Humphrey other than that he was black.

But trial records show Hagedorn was missing from the courtroom during the direct

> examination of the forensic pathologist, and later had to ask the judge to summarize that witness's testimony before his cross-examination.
>
> Wilson gave a closing argument that took 1½ pages to transcribe; the prosecutor's took 54.

Id.

Thus, the defense in this case began with a handwritten note begging for volunteers, and ended with Wilson clumsily attempting to defend himself because he lacked competent counsel. I cannot reflect on this case without recalling the landmark decision *Gideon v. Wainwright* and its admonition:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

372 U.S. 335, 344 (1963). Nearly half a century after *Gideon*, its promise remains unfulfilled. Capital defendants like Wilson are routinely appointed counsel without the experience, skill, or commitment to adequately represent them. Much of the arbitrary and discriminatory nature of our current death penalty stems from the fact that quality of representation is the single greatest factor in determining when it is applied. The proficiency of a capital defendant's attorney should not mean the difference between life

and death. I hope that if any good comes from this egregious case, it might serve as a clarion call for a recommitment to achieving *Gideon*'s guarantee of competent counsel for all defendants.

Over my more than thirty years on the bench, Wilson's trial stands out as one of the worst examples that I have seen of the unfairness and abysmal lawyering that pervade capital trials. Although I will continue to apply the law of the Supreme Court as required by my oath, I must reiterate my belief that "the idea that the death penalty is fairly and rationally imposed in this country is a farce." *Moore v. Parker*, 425 F.3d 250, 270 (6th Cir. 2005) (Martin, J., dissenting). To maintain the legitimacy of our adversarial system of justice, we must be confident that its two foundational components are sound: a neutral and fair arbiter, and adequate legal representation for both parties. If either pillar is fractured, as in this case, then we are left with a system that does not function. Its results cannot be trusted, particularly when a life is at stake. When a person is sentenced to death in a kangaroo court such as Wilson's, with an illicit sexual affair taking place between a co-defendant and a colleague of the trial judge and no semblance of qualified defense counsel, it irreparably tarnishes our legal system. Until we reform this broken system, we cannot rely on it to determine life and death.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

179

(2)

No.10-800

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States

GREGORY WILSON, *Petitioner*

versus

LADONNA H. THOMPSON, IN HER OFFICIAL CAPACITY AS COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents

A CAPITAL CASE

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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CAPITAL CASE

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Should a new prerequisite be added when determining the date of accrual for method of execution challenges brought under 42 U.S.C. § 1983 to require that any habeas corpus proceedings be completed before the inmate may file such a challenge?

II. Should the statute of limitation begin anew when a state adopts an existing death penalty protocol as an administrative regulation without making any substantial change to the method of execution?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Sixth Circuit were adequately set out by the Petition.

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OPINION BELOW

The opinion of the Court of Appeals is reported at 620 F.3d 699 and is included in the Petitioner's Appendix A, pp. 1a-8a.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves 42 U.S.C. § 1983, as adequately set out in the Petition.

COUNTERSTATEMENT OF THE CASE

A. Substantive Facts of the Underlying Offense

The Supreme Court of Kentucky summarized the brutal kidnaping, robbery, rape, and murder of the victim, Deborah Pooley, in *Wilson v. Commonwealth*, 836 S.W.2d 872, 876-77 (Ky. 1992), *cert. denied*, 507 U.S. 1034 (1993). Debbie was forced into her own car at knife point and begged Wilson for her life as he raped her in the back seat. Wilson and a co-defendant coldly told her that they had to kill her so that she could not identify them. After dumping Debbie Pooley's naked body in a field in Indiana, the two co-defendants went on a shopping holiday with her credit cards.

B. Procedural History

Wilson was convicted of the brutal crime and sentenced to death for murder. *Wilson v. Commonwealth*, 836 S.W.2d 872 (Ky. 1992). This Court denied certiorari in 1993. *Wilson v. Kentucky*, 507 U.S. 1034 (1993). Wilson then pursued state post conviction proceedings in *Wilson v. Commonwealth*, 975 S.W.2d 901 (Ky. 1998) *cert denied,* 526 U.S. 1023 (1999). Ultimately, Wilson's petition for habeas corpus was rejected by the Sixth Circuit in *Wilson v. Parker*, 515 F.3d 682 (6th Cir. 2008) *cert. denied*, 130 S.Ct. 113 (2009).

After Wilson's conviction the Kentucky legislature

adopted lethal injection as the primary means of carrying out death sentences in the Commonwealth. KRS 431.220. That statute allowed those inmates already serving death sentences to select between the new lethal injection procedure or the former electrocution procedure. KRS 431.220(1)(b). Under the terms of the statute, the inmate is required to select electrocution at least twenty days prior to the scheduled execution. *Id.* If the inmate refuses to make an election, then the default method is lethal injection. *Id.*

The record before the District Court noted that, in July of 2004, Wilson and a group of other inmates evidenced their awareness of the lethal injection procedure by filing a group grievance. That grievance asserted that the types of drugs utilized, the timing of administration, and the amounts of the drugs utilized was "wrong" and alleged a civil rights violation.

On November 30, 2007, after Wilson's habeas petition had been rejected by the District Court, Wilson filed the present suit in the Eastern District of Kentucky, pursuant to 42 U.S.C. § 1983, alleging that the use of Kentucky's lethal injection protocol to carry out his death sentence would violate his constitutional rights. That suit was dismissed on September 30, 2009, as Wilson's claim was barred by the applicable statute of limitation. The District Court applied the Sixth Circuit's decision in *Cooey v. Strickland (Cooey II)*, 479 F.3d 412 (6th Cir. 2007), to reach the conclusion that Wilson's claim accrued, at the very latest, when he demonstrated

awareness of the Commonwealth's presumptive method of execution by filing his July 2004 grievance. Thus, the applicable one year statute of limitation expired, at the very latest, more than two years prior to initiation of his action.

C. Arguments Presented to the Lower Courts

The Petitioner's arguments substantially changed as this matter rose through the courts. It should be noted that the Petitioner did not challenge the applicability of *Cooey II* before the District Court. In fact, the Petitioner's counsel agreed that "*Cooey* does provide the basic analytical framework for determining the accrual date for method of execution claims" on page two of his Memorandum Opposing Defendant's Motion to Dismiss, filed as document twenty-eight in the District Court proceedings. Instead, Wilson relied upon the Kentucky statute that allowed him to elect electrocution in lieu of lethal injection to argue only that his claim could not possibly be ripe for determination until such an election had been made.

Shortly after Wilson's claim had been dismissed, the Supreme Court of Kentucky decided a case that had been pursued by other death row inmates, *Bowling v. Kentucky Dept. Of Corrections*, 301 S.W.3d 478 (Ky. 2009). The *Bowling* decision required the Department of Corrections to promulgate the death penalty protocol as administrative regulations. Kentucky complied, and the regulations became effective on May 7, 2010 (501 Ky.

Admin. Regs. 16:330).

Upon the filing of the Sixth Circuit brief, which was subsequent to the rendition of the *Bowling* opinion, it became evident that the Petitioner had completely changed his arguments. Instead of the argument made before the District Court, the Petitioner argued that the matter should be remanded in light of the *Bowling* decision. In the alternative, the Petitioner maintained before the Sixth Circuit that *Cooey II* had been wrongly decided. Notably, the Petitioner still failed to argue that the District Court's analysis or application of *Cooey II* had been flawed.

Upon considering these arguments, the Sixth Circuit affirmatively stated that it would not consider any argument that *Cooey II* was incorrect, as such an argument had not been made to the District Court. The Sixth Circuit further stated that it would not discuss the District Court's application of *Cooey II*, as that application was not challenged by the brief. Instead, the Sixth Circuit affirmed the ruling and determined that remand in light of *Bowling* was unnecessary as *Bowling* did not change the protocol or the applicable analysis.

REASONS FOR DENYING THE WRIT

The question that the Petitioner framed for this Court does not pose arguments that are squarely presented by this case. Given that the state court decision at issue was not decided prior to the conclusion of the District Court proceeding, that decision was never addressed by the District Court. Instead, the Petitioner changed course before the Court of Appeals to raise arguments that were entirely new, and thus, are not appropriate for *certiorari*. Further, the arguments presented by the Petitioner have been adequately addressed by the Sixth Circuit's opinion. That opinion is in agreement with the only other Circuit Courts that have considered this type of method of execution challenge. Thus, at most, the Petitioner is requesting that this Court take up a case that largely rests upon the District Court's application of the facts to the test for accrual set out by the Sixth Circuit in *Cooey II*.

I.

THE PETITIONER DID NOT RAISE OR LITIGATE THE QUESTION PRESENTED IN THE LOWER COURTS

As set out above, before the District Court, the Petitioner agreed that the Sixth's Circuit's decision in *Cooey v. Strickland (Cooey II)*, 479 F.3d 412 (6th Cir. 2007), provided the applicable guidelines for determining

when a method of execution claim accrued, and merely asserted that Wilson's claim could not become ripe until he manifested rejection of electrocution as a viable method for carrying out his death sentence. At the time of the District Court proceedings, the state court's decision in *Bowling* did not exist. Thus, the Petitioner has continued to craft new arguments at every level of these proceedings.

The Petitioner's argument before the Sixth Circuit significantly expanded above and beyond the limited stance taken before the District Court. However, the Sixth Circuit noted it would assume that the District Court's application of *Cooey II* was correct, due to the Petitioner's failure to assert any disagreement with that application. The Sixth Circuit also noted that it would not consider the new assertion that *Cooey II* was incorrectly decided, given that this argument was not raised before the District Court.

Now, before this Court, the Petitioner has melded and expanded his claim beyond all recognition by simultaneously asserting that the Sixth Circuit's *Cooey II* framework is flawed, while also asserting that the Sixth Circuit has inexplicitly misinterpreted *Bowling's* effect on that analysis. While there is no jurisdictional bar that would prohibit this Court from determining issues that were not presented to the lower courts, the Court has rejected such issues in the past. See e.g. *Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980). This Court has stated that it will avoid questions that are not raised

or litigated in the lower courts, especially where the proponent of the question accepted a particular legal analysis before the lower courts. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (dismissing writ of *certiorari* as improvidently granted where Petitioner requested jury instruction).

Here, the question does not present a constitutional issue, and the Petitioner's statutory argument has been changed and re-crafted beyond recognition. As a result, the Petitioner is requesting that this Court examine the District Court's application of facts in light of a state court decision that did not exist at the time that the Petitioner filed suit, or when the District Court rendered its judgment. The Petitioner's argument also relies upon state administrative regulations that did not exist when he filed his action. The Petitioner also now challenges the underlying ruling in *Cooey II*, and its application herein, despite having expressly accepted its controlling precedential value before the District Court. Given the questionable procedural posture herein, this Court should deny the Writ.

II.

THE SIXTH CIRCUIT'S ACCRUAL ANALYSIS IS CONSISTENT WITH PRECEDENT AND WITH THE TESTS CREATED BY OTHER CIRCUITS

Even assuming, for the purposes of argument only

and without any concession, that the question posed by the Petitioner was addressed by the lower courts and was squarely and fully before this Court, the Writ should be denied. The Sixth Circuit's decision regarding claim accrual for method of execution challenges is fully consistent with precedent. It is also consistent with the decisions of other Circuits that have had the opportunity to address similar issues.

A. The Sixth Circuit's Opinion in this Matter and in *Cooey II* Fully Complied with Precedent

In *Wallace v. Kato*, this Court stated that accrual occurs when "the plaintiff has a complete and present cause of action" *Wallace v. Kato*, 549 U.S. 384, 388 (2007)(internal quotations omitted). This occurs when "the plaintiff can file suit and obtain relief." *Id.* The Sixth Circuit followed this guideline in *Cooey II*, which relied upon *Wallace*. *Cooey v. Strickland (Cooey II)*, 479 F.3d 412, 416 (6th Cir. 2007).

The Petitioner tacitly acknowledges, on pages 8-10 of the Petition, that Wilson could have filed his claim earlier. There seems to be no dispute that Wilson was aware of the Commonwealth's execution methodology prior to 2004. However, he asserts that method of execution claims filed and litigated in tandem with federal habeas corpus petitions will cause such a state of confusion that, for the purposes of this type of claim, a new prerequisite should be added to the test for claim accrual. Thus, he urges this Court to adopt a test that

adds to the requirement of *Wallace* that "all state and federal avenues of relief have been exhausted." Page 11 of Petition.

This Court's decision in *Hill v. McDonough*, 547 U.S. 573 (2006) defeats the Petitioner's first argument. This Court has already determined that issues that challenge a state's death penalty procedure are properly brought under 42 U.S.C. § 1983. Nothing in the *Hill v. McDonough* opinion suggests that method of execution challenges cannot proceed until the validity of the sentence is collaterally challenged through a petition for habeas corpus.

Likewise, the Petitioner's second suggestion, that a new prerequisite be included when considering accrual of such actions, is also without merit. There is no such requirement in any precedent. Indeed, the Eleventh Circuit has specifically rejected this method of calculation "because doing so would prolong unnecessarily the time during which a litigant should reasonably anticipate the need to file suit and would fail to show proper respect for principles of federalism." *McNair v. Allen,* 515 F.3d 1168, 1175 (11th Cir. 2008).

The Petitioner finds support for this new and added prerequisite only in the dissenting opinion in *Cooey II*. As a result, although the Petitioner asserts that *Cooey II* conflicts with *Wallace* - the Petitioner has failed to state any such conflict. Instead, it would be more precise to say that the Petitioner is proposing that this

Court adopt a new test for accrual that would apply only to method of execution challenges filed by condemned inmates. This proposal is based only upon an assertion that, simply stated, suggests that it would be beneficial to prolong the post conviction process by allowing capital defense attorneys to avoid simultaneous proceedings.

It should also be noted that the Petitioner's argument concerning the effect of the state court's *Bowling* decision did not render the then existing protocol *void ab initio*. Prior to *Bowling* the protocol was an internal operating procedure and was used to carry out death sentences. As the Kentucky Court noted, only a portion of the procedure had been promulgated by reference in other administrative regulations. After *Bowling* the Department of Corrections promulgated a larger portion of the protocol as an administrative regulation. The *Bowling* decision changed the classification of the document from internal procedure to administrative regulation, but in effect the pre-*Bowling* protocol remains the same as it was when Wilson filed his 2004 grievance.

B. The Sixth Circuit's Analysis is Consistent with the Approaches Adopted by Other Circuits

The question of when a method of execution challenge under 42 U.S.C. § 1983 accrues has only been addressed by three Circuits (including the Sixth Circuit). However, those circuits have adopted tests that are substantially similar. Both the Fifth Circuit and the

Eleventh Circuit have joined the Sixth Circuit in creating tests that conclude that accrual occurs upon the finality of conviction or upon a significant change in the presumptive method of execution.

The Eleventh Circuit (like the Sixth) has concluded that accrual occurs when the execution protocol becomes applicable to the inmate. *McNair v. Allen,* 515 F.3d 1168, 1177 (11th Cir., 2008). In further recognizing that methods of execution are subject to change, the Eleventh Circuit further noted that "a significant change in the state's execution protocol" would be required in order to have an impact upon the date of accrual. *McNair v. Allen,* 515 F.3d at 1177. In the case at bar, there was no significant change in the procedure.

In *Walker v. Epps,* the Fifth Circuit relied upon *Cooey II* and *McNair*, and agreed that accrual occurs upon finality of the conviction. However, the Fifth Circuit also noted that a change in the procedure would affect accrual by adding that "in the event a state changes its execution protocol after a death-row inmate's conviction has become final, the limitations period will necessarily accrue on the date that protocol change becomes effective." *Walker v. Epps*, 550 F.3d 407, 414 (5th Cir. 2008). Under this method, Wilson's claim accrued, at the latest, when Kentucky adopted lethal injection as the default method of execution in 1998 under KRS 431.220.

Thus, the application of the tests enunciated by the

Fifth Circuit, the Sixth Circuit, and the Eleventh Circuit also create the same result in the matter at bar. Each Court of Appeals that has examined the issue requires that a significant change in the procedure must occur before accrual will be affected. Under any of these tests, Wilson's claim accrued, at the very latest, in 2004, when Wilson fully evidenced his knowledge of Kentucky's execution protocol.

C. The Sixth Circuit Correctly Assessed the Effect of *Bowling* on Method of Execution Challenges

Given the substantial similarity between the three Circuits that have addressed the question, it is apparent that the Sixth Circuit correctly assessed the impact of the state court decision in *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478 (2009). As the Sixth Circuit noted, the regulations that were adopted by Kentucky under the Administrative Procedures Act (as required by the *Bowling* Opinion) were nearly identical to the protocol that existed and was extensively litigated prior to *Bowling*. 501 Ky. Admin. Regs. 16:330. In fact, the *Bowling* Court noted that some portions of that protocol had been included by reference in existing administrative regulations. Given further that Wilson's claims are extremely broad - it can only be concluded that there was no substantial change that should impact any accrual calculation. As the District Court determined, Wilson was aware of the protocol in 2004. Thus, his claim accrued no later than 2004. In fact, it is likely that his claim accrued upon the adoption of lethal injection in

Kentucky, in 1998.

CONCLUSION

For the foregoing reasons, the Commonwealth of Kentucky asks this Court to deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

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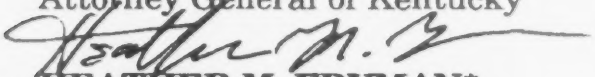

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTRODUCTION

In this 42 U.S.C. § 1983 action challenging Kentucky's method of execution, the Sixth Circuit Court of Appeals foreclosed consideration of Petitioner's claims as time-barred even though the claims were brought while the conviction and sentence were under review in federal post-conviction proceedings, and even though the challenged protocol had been declared void *ab initio* by the Kentucky courts.

In opposing certiorari, Respondents contend that: 1) the issues advanced are not squarely presented because they were neither raised nor litigated below [Respondents' Brief in Opposition (Respondents' Br.) at 6-8]; 2) the Sixth Circuit's claim accrual analysis for method of execution claims is consistent with this Court's precedents and with those from other circuits [*id.* at 8-13]; and 3) the claim accrual analysis employed here is unaffected by the Kentucky Supreme Court's decision in *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478 (Ky. Nov. 25, 2009), as corrected (Jan. 4, 2010). [*Id.* at 13.]

Respondents' arguments are misplaced and serve to highlight the reasons why certiorari is appropriate to resolve important questions of claim accrual in method of execution cases.

ARGUMENT

I. THE ISSUES PRESENTED ARE PROPERLY BEFORE THE COURT.

Respondents' primary argument — that the issues presented were neither raised nor litigated below [Respondents' Br. at 6-8] — relies, in part, upon the unremarkable proposition that Wilson acknowledged to the district court the existence (and precedential value) of the Sixth Circuit's decision in *Cooey v. Strickland* (*Cooey II*), 479 F.3d 412 (6th Cir. 2007). [Respondents' Br. at 4.] But Respondents' characterization of Wilson's position below is, at best, incomplete. Specifically, Respondents state that Wilson acknowledged in the district court that *Cooey II* set forth the Sixth Circuit's claim accrual framework for method of execution claims [*id.* at 6] and "expressly accepted its controlling precedential value." [*Id.* at 8.]

Counsel for Wilson, of course, acknowledged *Cooey II* in the district court and noted its precedential value. To do otherwise would have constituted a breach of his ethical duties. *See* Kentucky Rule of Professional Conduct (KRPC) 3.130-3.3. However, Wilson did not accept *Cooey II*'s holding as "controlling" in this case. Rather, Wilson sought to distinguish *Cooey II* and specifically argued why the case was inapposite. This fact is evident when that portion of Wilson's district court brief cited by Respondents is quoted more fully:

> Although *Cooey* does provide the basic analytical framework for determining the accrual date for method of execution claims, it does not answer the question of when such claims accrue when the default accrual date —

> at the conclusion of direct review — pre-dates the state's adoption of the challenged method of execution. *See Cooey*, 479 F.3d at 422 (applying, without deciding, Ohio's adoption of lethal injection as the "exclusive method of execution" in 2001 as the relevant claim accrual date rather than Ohio's adoption of lethal injection as a mere secondary form of execution in 1993).

[R.28: Plaintiff's Response Memorandum Opposing Defendants' Motion to Dismiss at 2.] Thus, while it is correct that Wilson did not argue to the district court that *Cooey II* was wrongly decided and seek its reversal (a remedy, of course, the district court lacked authority to grant), there was no need to do so because, as Wilson argued, *Cooey II* did not control the outcome of the claim accrual analysis here.

The district court rejected Wilson's arguments, however, and grounded its dismissal of his claims upon *Cooey II*. [Petitioner's Appendix (Pet. App.) at 12a-20a.] Wilson then appealed to the Sixth Circuit where he argued, in part, that *Cooey II* was wrongly decided. [Pet. App. at 5a.] Contrary to Respondents' assertion, the Sixth Circuit panel refused to "entertain" Wilson's argument regarding *Cooey II* because it lacked authority to overrule the reported decision of a prior panel, *not* because Wilson failed to raise the issue in the district court. [*Id.*]

Under this posture, the issue of whether *Cooey II* is consistent with this Court's existing precedent is adequately preserved for review and, for the reasons stated in Wilson's petition, justify the exercise of this Court's certiorari jurisdiction. *See, e.g.*, *United States v. Vonn*, 535 U.S. 55, 59 n.1 (2002) (claim "preserved if

made by the current litigant in 'the recent proceeding upon which the lower courts relied for their resolution of the issue, and [the litigant] did not concede in the current case the correctness of that precedent'" (quoting *United States v. Williams*, 504 U.S. 36, 44-45 (1992)); *see also Boumediene v. Bush*, 553 U.S. 723, 772, (2008) (noting "exceptional" circumstances justify reaching merits of question left unaddressed by Court of Appeals).

II. *HILL V. MCDONOUGH* DOES NOT ANSWER THE QUESTION PRESENTED HERE.

Respondents also argue that certiorari should be denied because the Sixth Circuit opinion is otherwise consistent with this Court's precedents. [Respondents' Br. at 9-11.] In doing so, Respondents rely upon *Hill v. McDonough*, 547 U.S. 573 (2006) by stating that "[n]othing in the *Hill v. McDonough* opinion suggests that method of execution challenges cannot proceed until the validity of the sentence is collaterally challenged through a petition for habeas corpus." [Respondents' Br. at 10.]

But Respondents' argument misses the mark because *Hill* did not consider the issue presented here. Rather, *Hill* addressed whether a death row inmate may challenge the particular method of execution under 42 U.S.C. § 1983, or whether such a challenge must be brought via a habeas corpus petition. *Hill*, 547 U.S. at 579-80. While Respondents are correct, in a formalistic sense, that *Hill* does not affirmatively support Wilson's contention regarding claim accrual analysis [Respondents' Br. at 10], they err in relying on the decision's silence on that point to support the opposing proposition. "'Questions which merely lurk

in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

CONCLUSION

For the foregoing reasons, and those contained in the petition for writ of certiorari, Wilson respectfully requests that certiorari be granted.

Respectfully submitted,

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